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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 354.

GEORGE E. MORTON, TRUSTEE, AND CITY NATIONAL BANK, A BANKING CORPORATION, AS TRUSTEE AND INDIVIDUALLY, PETITIONERS,

VS.

DARDANELLE SPECIAL SCHOOL DISTRICT No. 15 OF YELL COUNTY, ARKANSAS, RESPONDENT.

BRIEF OF AMICUS CURIAE.

JUSTIN D. BOWERSOCK,
Counsel for Martin-Holloway-Purcell, As Amicus Curiae.

ROBERT B. FIZZELL,
JOHN F. RHODES,
Of Counsel.

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VS.

DARDANELLE SPECIAL SCHOOL DISTRICT No. 15 OF YELL COUNTY, ARKANSAS, RESPONDENT.

BRIEF OF AMICUS CURIAE.

I.

PRELIMINARY STATEMENT.

The undersigned, as counsel for Martin-Holloway-Purcell, respectfully submit the following brief, *amicus curiae*. The written consent of all parties to the case, required by Paragraph 9 of Rule 27 of the rules of this court, has been heretofore filed with the clerk.

Martin-Holloway-Purcell is the firm name of a partnership composed of David H. Martin, Webster W. Holloway and Hoyt Purcell. The business of the partnership consists in dealing in investment securities, largely in bonds and other evidences of indebtedness issued by

municipal corporations of a number of different states. The members of the firm have participated in the purchase and sale, over a period of years, of large amounts of bonds issued by special school districts in Arkansas under the authority and provisions of Act 248 of the Acts of Arkansas, 1905, as amended, some of which bonds are still outstanding. The firm owns no such bonds at this time in its own right or for others, but by reason of its purchase and sale of such bonds, and its interest in the credit of the urban special school districts of the State of Arkansas, it desires to support the position of the petitioners in this proceeding.

The matter presented in this brief is directed primarily to the fundamental question whether, under the statutes and decisions of the Supreme Court of Arkansas existing at the time of the issuance of the bonds here involved, the board of directors of the respondent special school district had power to pledge the tax revenues of the district, as and when the same were annually voted, levied, collected, and received by said district, to the payment of said bonds,[1] even though the board of directors, in the first instance, had no power, either directly or indirectly, to impose or collect any such taxes.

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[1]As, for example, was specifically provided for by Act 318, Acts, 1905, p. 760, entitled "An Act to form School Districts Nos. 16 and 38, in Jackson County, Arkansas, into a special school district to be known as 'Tuckerman Special School District,' and permit the same to borrow money," which act contained the following Section 5:

> "Section 5. Said board of directors is further empowered and authorized to pledge or use such part of the levy of taxes annually of said district for the purpose of paying off said note or notes and the interest thereon, or for creating a sinking fund for such payment as may be necessary."

Eight other special acts adopted by the 1905 Legislature contained specific authority to pledge all or part of the revenues of the districts named. These, and similar acts passed at the 1907 session of the Arkansas legislature, are of the highest importance as the Supreme Court of Arkansas said in 1908 that the general act (Act 248, Acts, 1905) "is broader in its scope than any of the special acts. It covers the whole subject matter embraced by them and the objects designed to be effected are the same" (*Hampton* v. *Hickey*, 88 Ark. 324, 114 S. W. 707).

The petition for certiorari herein, in its Point III, entitled "Questions Presented," states this question, in its Paragraph 2, as follows (p. 7):

> "2. Whether the school directors at the time of the issuance of these bonds had power and authority to pledge, in addition to the mortgage on the lands and buildings, all revenues and resources of the district for the repayment of the borrowed money."

The heading of Point I of the argument in the brief for respondents is (p. 8) "Petitioners Never Had an Enforceable Contract for Any Tax Revenue." This Point I takes up eleven and one-half pages of respondents' brief, out of a total of twenty-six pages, and clearly appears to be their point of strongest reliance. The argument there made is that the board of directors never had the power to pledge the tax revenues of the district, in the first instance, and, consequently, that the covenants made with the purchasers and holders of these bonds, and by other similar districts with the purchasers and holders of similar bonds, pledging the tax revenues, as well as all other revenues, as and when received, never constituted an enforceable obligation. The argument under Point I of the respondents' brief closes with the following sentence (p. 19):

> "Prior to the issuance of these bonds, there was only one Arkansas Supreme Court decision that construed the rights of bondholders in the revenues of a district, and this was the Schmutz case (*Schmutz v. Special School District of Little Rock*, 78 Ark. 118, 95 S. W. 438), which does not hold that the directors have the right to pledge any revenues."

It is felt by *amicus curiae* and associate counsel that the power in question not only existed under Act 248, Acts, 1905, and was exercised for over twenty-five years, but with all respect, that, at the end of this long period of time, counsel and the courts may have overlooked relevant

statutes and a number of decisions (in addition to the *Schmutz* case) which we think clearly establish the existence of that power. Perhaps it should not be said that they have been overlooked, even though we have cited, and quoted from, many relevant statutes and decisions not mentioned in the briefs of the parties, but that they have not been presented in the sequence and manner that shows so clearly their true meaning, and, by the same token, shows so clearly the existence of the questioned power. This is to say, therefore, that counsel as *amicus curiae*, while in accord with the position taken by petitioners, is not fully in accord with the course of arguments on this one question.[2]

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[2]The crux of the matter comes with the statement on page 24 of the brief for petitioners that "Said Act 55 of 1905 and Act 248 (Acts of 1905), as amended, *are identical* on the matters under discussion." Act 55, Acts of 1905, was the statute under consideration in the case of *Schmutz* v. *Special School District of Little Rock*, 78 Ark. 118, 95 S. W. 438. As we point out below, Section 2 of that act was not, in fact, precisely identical with Section 2 of Act 248, Acts of 1905 (the general act, under which the bonds in question here were issued), but, on the contrary, the variation in language might have been thought to have restricted the application of Act 55 and was, we believe, the reason for the seemingly hesitant language of the opinion in that case which the respondents quote on page 11 of their brief. Not only counsel here, but also the Circuit Court of Appeals in the case of *Women's Catholic Order of Foresters* v. *Special School District of North Little Rock*, 105 F. 2d 716, makes the same assumption, which, we believe, may have largely contributed to the result which has been reached in this case.

II.

ARGUMENT.

Point I. The Historical Development of the Power to Pledge the Revenues, As and When Received, and the Clear Evidence of the Existence of That Power.

The proposition that the board of directors of a special school district could make a valid pledge of tax revenues to be received over a period of years, which they had no power to levy, but which had to be voted affirmatively each year by the electors of the district, as and when the revenue from such levy was received (as well as all other revenues of the district), may appear to be something anomalous, if not startling, but it was a perfectly natural and understandable development of the law relating to school districts in Arkansas.

Act 13, Acts, 1869 (Act of February 4, 1869), provided for the creation of "single" school districts out of incorporated cities or towns,[3] and Section 7 of that act authorized the county court to levy the tax for school purposes upon the certificate of the board of directors of such districts, no election being required. The Act of February 4, 1869, is set out in full in the appendix to petitioners' brief, and Section 7 thereof is set out in full on pages 42 and 43. The power to provide for the

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[3]The apparent derivation of the term was to afford a contrast to the situation existing where there had been two or more school districts in a city or town. The word "single" fell into disuse, and school districts organized in, and occupying all of, incorporated cities and towns became and are known as "special" school districts, and are referred to herein as urban special school districts, where appropriate, in order to distinguish them from rural special school districts, created by special acts of the legislature, organized under the general acts for the organization of rural special school districts (Act 321, Acts, 1909, p. 947, as amended by Act 169, Acts, 1911, p. 141).

levy and collection of taxes for school purposes in this manner (*i. e.*, without an election) was taken away from the directors of all school districts by virtue of the provisions of Section 3 of Article XIV of the Constitution of 1874, at least as to a school tax in excess of two mills on the dollar.

Section 3 of Article XIV of the Constitution of 1874, as originally adopted, read as follows:

> "Section 3. The general assembly shall provide by general laws for the support of common schools by taxes, which shall never exceed in any one year two mills on the dollar on the taxable property of the state, and by an annual *per capita* tax of one dollar, to be assessed on every male inhabitant of this state over the age of twenty-one years. Provided, the general assembly may by general law authorize school districts to levy by a vote of the qualified electors of such a district a tax not to exceed five mills on the dollar in any one year for school purposes. Provided further, that no such tax shall be appropriated to any other purpose nor to any other district than that for which it was levied."

It was apparently thought, for some time after the adoption of the Constitution of 1874, that the restrictions of that section applied only to common schools and not to "single" or special school districts organized in incorporated cities and towns. In the report of the case of *Cole, as Sheriff and Collector,* v. *Blackwell,* (1881) 38 Ark. 271, we find the following report of the argument for the appellant (p. 273):

> "W. N. May, for appellant:
>
> "Argues that Section 5524 and other sections of Gantt's Digest (Section 7 and other sections of the Act of 1869) were not abrogated or repealed by Section 3, Article XIV, Constitution, 1874, but were still in full force and effect. Section 3 manifestly referred *alone* to the common school districts where there

were only three trustees, and not to *special* school districts with six directors under the school law for cities and towns" (italics not supplied).

In the case of *Cole* v. *Blackwell*, *supra*, it appeared that the Dardanelle special school district had been created in 1879 (the same district whose bonds are involved in this proceeding; Petitioners' Brief p. 17). In the same year a large majority of the electors had voted against the levy of a special tax for the support of a free school in the district for the year 1880. Nevertheless, the directors of the district made an estimate to the county court of the amount necessary for that purpose, and the county court proceeded to levy a tax of two and one-half mills therefor. After the board of directors had employed teachers, who had then been teaching for seven months, some resident taxpayers brought an action to enjoin the collection of the tax. The Supreme Court affirmed the decree of the chancellor holding the tax illegal and enjoining its collection. The full opinion, omitting the quotation of Section 3 of Article XIV of the Constitution, and the citation of cases, reads as follows:

"Harrison, J. So much of Section 5524 of Gantt's Digest as conferred authority upon the board of supervisors (now county court) to levy the district school tax in cities and towns, organized into and established as single school districts, upon the estimate of the board of school directors and without a vote of the electors of the district, was abrogated and repealed by Section 3 of Article XIV of the present Constitution, which is as follows:

* * * * * * *

"It is thus seen that the power to levy the tax now belongs to the district and is exercised by a vote of the electors, and belongs to all districts alike, and that the levy of such tax is not within the jurisdiction of the county court.

"The tax sought to be enjoined, having been levied by the county court, and not by the electors of the district, was, therefore, illegal and void."

Thus, from 1881, the date of the decision in the case of *Cole* v. *Blackwell, supra*, we think it was clearly understood that the board of directors of a special school district had no power to levy, or to cause the levy and collection of, any tax for school purposes, and that the tax had to be affirmatively voted in each year by the electors of the district. With the growth of the state, and in particular, with the growth of its cities, very practical considerations made it apparent that the special school districts created coextensively with incorporated cities and towns had many difficulties and problems which were not met with in the rural common school districts. Among these considerations was the constant necessity for additional and larger school buildings, constantly necessitating the raising of large sums of money.

In 1903 the legislature took cognizance of the needs of these special school districts in incorporated cities and towns by the passage of Act 85, Acts of 1903, page 145. This act, in full, reads as follows:

"ACT 85.

AN ACT to authorize special free school districts to borrow money for building purposes, giving the districts the power to mortgage their property for such purpose.

SECTION

1. Authorizes all special free school districts to borrow money and mortgage school property for payment of same.
2. Evidences of indebtedness shall be the same in form as if executed by natural persons, and warrants to have the same validity as if there were money in the treasury to pay same at the time they are issued.
3. School districts to have the same right in law or equity as natural persons.
4. The question of borrowing money shall be submitted to the electors of the school district at the annual school election.
5. Act in effect from passage.

Be it enacted by the General Assembly of the State of Arkansas:

SECTION 1. That all special free school districts in the State of Arkansas are hereby authorized and empowered, for the purpose of raising funds for the erection and equipment of necessary school buildings, to borrow money and mortgage the real property of the district as security therefor, under such conditions and regulations as to amount, time and manner of payment as the board of directors of said school district shall prescribe, and renew and extend from time to time any evidence of indebtedness or mortgage, or both, issued or made by virtue hereof.

SECTION 2. Said evidence of indebtedness, whether warrants or promissory notes, or both, shall be in form in all respects as other instruments of like kind are required by law to be, and shall have the same force and effect as they would have if executed by natural persons, and the warrants shall have the same validity as they would have if there were money in the county treasury to pay the same at the time they were drawn, and may be drawn payable in the future and need not be registered with the county treasury till the time for payment, but shall be drawn upon the building fund and paid out of it in the order of their date as the building fund is provided and collected by successive levies and collections, and said school district shall be allowed in law or equity no defense merely by reason of the fact that it is a school district.

SECTION 3. Nothing in this act shall be so construed as to prevent or cut off from such school district any right in law or equity which a natural person might claim and assert under like circumstances; and in any action by or against said district arising on any instrument or contract made under this act, the district shall as far as practicable be decreed and treated as a natural person.

SECTION 4. For the purpose of this act, whenever a majority of the directors of any special school district deem it advisable to borrow money for the purpose of building schoolhouses or repairing those

already built or furnishing the same, they shall, thirty days previous to the annual school election, give notice to the electors that such question will be submitted at said annual school meeting, and the electors of said district shall vote for or against authorizing the directors to borrow money under the provisions of this act; and the directors shall not be authorized to borrow money under the provisions of this act unless a majority of the electors voting at said election shall vote for the same.

SECTION 5. This act shall take effect and be in force from and after its passage.

(This bill having remained with the governor five days (Sundays excepted) and the general assembly being in session, it has become a law this March 17, 1903.)"

Possibly because of the fact that the legislature, at its same session in 1903, had passed a number of special acts authorizing special school districts to borrow money, in which no mention was made of the requirement of an election,[4] the legislature re-enacted the above statute in

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[4]The legislature of 1903 had passed eleven of such acts, which are here tabulated:

Act 20, p. 24	Special School District of Atkins
Act 28, p. 49	Booneville Special School District
Act 56, p. 93	Benton Special School District
Act 64, p. 116	Special School District of Walnut Ridge
Act 106, p. 181	Marmaduke Special School District
Act 113, p. 190	Special School District of Rocky Comfort
Act 116, p. 193	Special School District of Clarendon
Act 149, p. 262	Special School District of Pocahontas
Act 177, p. 341	Special School District of Van Buren
Act 185, p. 353	Waldron (Single) School District
Act 191, p. 374	School District No. 23 of Searcy County.

It is significant that with the exception of Act 191, which applied to a common school district, all of these acts applied to special school districts, all authorized the borrowing of money, not one of them so much as mentioned an election, and not one of them mentioned the pledge of all or any part of the revenues of the district. Act 185 (Waldron) is of interest in connection with the *Schmutz* case (*Schmutz* v. *Special School District of Little Rock*, 78 Ark. 118, 95 S. W. 438) and is mentioned hereafter.

1905, so as to omit Section 4, which had required an election. This re-enactment was Act 248, Acts of 1905, p. 651. We think it significant that the title was considerably changed and the words "and for other purposes" were added, even though no change whatever was made in the three sections which were re-enacted. For purposes of comparison, we are also setting out this act in full:

"ACT 248.

AN ACT to permit any special school district in the State of Arkansas to borrow money for building purposes, and to mortgage the property of the district to secure the same, and for other purposes.

SECTION

1. Authorizes all special school districts to borrow money for building purposes and mortgage the school property of the district for payment of same.
2. Evidences of indebtedness to be in form as other instruments of like character given by individuals, etc.
3. Rights of such special school districts in law or equity.
4. Act in effect from passage; laws in conflict repealed.

Be it enacted by the General Assembly of the State of Arkansas:

SECTION 1. That all special school districts in Arkansas are hereby authorized and empowered, for the purpose of raising funds for the erection and equipment of necessary school buildings, to borrow money and to mortgage the real property of the district as security therefor, under such conditions and regulations as to time, amount, rate of interest and manner of payment as the board of school directors of said school district shall prescribe, and to renew and extend from time to time any evidences of indebtedness or mortgages, or both, issued or made by virtue hereof.

SECTION 2. The said evidences of indebtedness, whether warrants or promissory notes, or both, and mortgages, shall be in form in all respects as other instruments of like kind are required by law to be, and shall have the same force and effect as they would if executed by natural persons, and the warrants shall have the same validity as they would if there were money in the county treasury to pay the same at the time they were drawn, and may be drawn payable in the future, and need not be registered with the county (treasury) until the time for payment, but shall be drawn upon the building fund and paid out of it in the order of their date, as the building fund is provided and collected by successive levy and collection, and said special school districts shall be allowed in law or equity no defense merely by reason of the fact that it is a school district.

SECTION 3. Nothing in this act shall be so construed as to prevent or cut off from any such school districts any right in law or equity which a natural person might claim and assert in like circumstances, and in any action by or against said districts arising on any instrument or contract made under this act, the district shall, as far as practicable, be deemed and treated as natural persons.

SECTION 4. This act shall take effect and be in force from and after its passage. All laws and parts of laws in conflict herewith are hereby repealed. *Provided*, however, That Jefferson County is exempt.

(Filed in the office of the secretary of state by the governor, May 6, 1905, without his signature, the general assembly being adjourned.)"

At the 1903 session of the legislature, by Act 204, W. F. Kirby was appointed to revise and digest all of the laws of the state, of a general nature. The digester so appointed accepted the task and the result was Kirby's Digest of the Laws of Arkansas (1904). W. F. Kirby subsequently became a member of the Arkansas Supreme Court and served on that court for many years, and several of the important opinions of the court relating to

these special school districts, and their powers with respect to the borrowing of money, were written by Judge Kirby.[5]

Section 1 of Act 248, Acts of 1905, was amended by Act 25, Acts of 1913, by the addition of a clause specifically authorizing the refunding of indebtedness incurred under the authority of Act 248, Acts, 1905, and the issuance of new evidences of indebtedness and new mortgages therefor. In view of certain enactments between 1905 and 1911, and three important decisions of the Supreme Court

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[5]Act 85, Acts, 1903, contained five sections, the fifth section being merely the provision that the act should take effect from and after its passage. The first four sections appeared as Sections 7696 to 7699, inclusive, of Kirby's Digest (1904).

No further official digest of the laws of Arkansas was made until Crawford & Moses Digest of 1921. In the meantime, Act 248, Acts of 1905, had been adopted, and slightly amended in 1913 and 1917.

Act 248, Acts of 1905, contained four sections, the fourth section providing that it should be in force from and after its passage, containing a repealing clause, and exempting Jefferson County from its operation. The first three sections were a reenactment of the first three sections of Act 85, Acts of 1903.

Section 2 of Act 248, Acts of 1905, was amended by Act 160, Acts of 1917, by the addition of two provisos requiring that bonds issued under the authority of Act 248, Acts of 1905, should be sold upon competitive bidding, after advertisement and notice, and at not less than par.

Section 4 of Act 248, Acts of 1905, was likewise amended by Act 160, Acts of 1917, so as to omit the provision exempting Jefferson County from the operation of the act. The fact that Jefferson County had been specifically excluded from the benefits of Act 248, Acts of 1905, is relevant to the proper understanding of the *Schmutz* case, *supra*.

Section 3 of Act 248, Acts of 1905, was not amended, until its repeal by Act 169 of the Acts of 1931.

Sections 1, 2 and 3 of Act 248, Acts of 1905, appeared as Sections 8977, 8978 and 9010 of Crawford and Moses Digest (1921). Section 4 was not digested. Section 9010 of Crawford and Moses Digest (1921) contains an erroneous note that it was amended by the Act of March 1, 1917 (Act 160, Acts of 1917), but such is not the case.

of Arkansas, one in 1908 and two in 1912,[6] this addition, made by the 1913 legislature, to the powers conferred by Act 248, Act of 1905, is of much significance, as indicating the legislative concurrence with the construction which had been put upon Act 248, Acts of 1905, by the decisions of the Arkansas Supreme Court rendered during the intervening eight years.

The question was subsequently raised as to whether the re-enactment of Act, 85, Acts of 1903, by Act 248, Acts of 1905, so as to omit the requirement of an election, was in fact a repeal of Section 4 of Act 85, Acts of 1903, the section which required the prior authority of an election. The Supreme Court of Arkansas so held, in a decision coming down on October 7, 1912, in the case of *Milwee* v. *Board of Directors of Horatio Special School District*, 105 Ark. 77, 150 S. W. 391, in which the opinion was written by Judge Kirby. Milwee and others had brought the suit to enjoin the board of directors from borrowing money, on the ground that the question had not been submitted to a vote of the electors of the district. The chancellor found that they had such authority, under Act 248, Acts of 1905, and dismissed their bill for want of equity. The Supreme Court said:

> "It is contended for the reversal of the judgment, first, that the directors of the special school district

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[6]These three cases were:

Hampton v. *Hickey*, (Dec. 7, 1908) 88 Ark. 324, 114 S. W. 707.

Crow v. *Special School District No. 2*, (Feb. 19, 1912) 102 Ark. 401, 144 S. W. 226.

Milwee v. *Board of Directors of Horatio Special School District*, (Oct. 7, 1912) 105 Ark. 77, 150 S. W. 391.

The first case coming before the Supreme Court of Arkansas in which the problem was involved (but not Act 248, Acts of 1905) was the case of *Schmutz* v. *Special School District of Little Rock*, (March 3, 1906) 78 Ark. 118, 95 S. W. 438.

of the town of Horatio were without power to borrow money and mortgage the property of the district to secure the payment thereof for the erection of a school building, unless first authorized to do so by a majority vote of the electors of the district * * *. The Act of March 17, 1903 (Sections 7696-7699 of Kirby's Digest), authorized and empowered all special, free school districts in the state to borrow money to secure funds for the erection and equipment of necessary school buildings, and to mortgage the real property of the district as security therefor, but such authority could not be exercised until a majority of the electors of the district at an annual school election, at which the question was submitted, first voted in favor thereof; the legislature at the 1905 session by act No. 248 of May 6, 1905, re-enacted the first three sections of said Act of 1903, leaving off Section 4 thereof (Section 7699, Kirby's Digest), which required the submission of the question of borrowing money to the electors of the district at an annual school election and a majority vote in favor thereof before it could be done. This act expressly repeals all laws in conflict and exempts Jefferson County from its provisions. Does it repeal, by implication, said omitted section?"

Act 248, Acts of 1905, had previously been before that court, in the case of *Hampton* v. *Hickey*, (Dec. 7, 1908) 88 Ark. 324, 114 S. W. 707, in which that court had held that Act 248, Acts of 1905, superceded and was broader than any of the special acts passed at the same session of the legislature authorizing the borrowing of money by the boards of directors of special school districts. This case is of importance on the question of the power of the boards of directors to pledge the revenues and income of the districts, and is discussed more fully below. By necessary implication, the case of *Hampton* v. *Hickey*, *supra*, must have held that the boards of directors did not require the prior authority of an election, but, in the *Milwee Case*, *supra*, after mentioning the case of

Hampton v. *Hickey, supra*, the court undertook to set the matter at rest beyond any possible question, saying:

> "It is true the question here presented was not directly passed upon in said cause (*i. e., Hampton* v. *Hickey, supra*), but the whole subject was taken up by the legislature anew, and the later act covers the entire ground of the former statute, except the provision requiring the majority vote of the electors before the power could be exercised, omitted therefrom, and was evidently intended as a substitute for the former statute and said omitted section was thereby impliedly repealed. It follows that the board was authorized to borrow money without the submission of the question to the electors of the district."

The Supreme Court of Arkansas never receded from its decision in the *Milwee Case, supra*, so that until the adoption of Act 169, Acts of 1931, it was established and unquestioned law of the state that the boards of directors of urban special school districts could borrow money and issue bonds without the prior authority of an election.

It may be said that we have taken pains to demonstrate something that is admitted on all sides, and that nothing has yet been said to show that in addition to the power to borrow money without the prior authority of an election the board of directors of an urban special school district also had the power to pledge the revenues thereof, as and when received, for the payment of such bonds. We respectfully submit that the one cannot properly be demonstrated without the other.

The legislature of Arkansas and the Supreme Court of the state recognized over a period of many years that there were practical differences between the rural school districts, on the one hand, and the special school districts in incorporated cities and towns, on the other hand. In the case of *Crow* v. *Special School District No. 2*, 102 Ark. 401, 144 S. W. 226, decided February 19, 1912, there

is an extended and pointed discussion of this difference, in an opinion written by Judge Kirby. The court pointed out, among other things, that:

> "The legislature provided for the organization of such districts under different methods, and also different laws for the government thereof, the directors, within the single or special school districts in the cities and towns and the territory annexed thereto, being given greater power for the management and promotion of the school interests than those of the common school districts, whose powers are limited and dependent largely upon the will of the electors as expressed at the annual school meetings."

There could be no more direct statement of the greater powers of the directors of the urban special school districts, and that such powers were not "dependent largely upon the will of the electors as expressed at the annual school meetings" as expressly held six months later in the *Milwee Case, supra.* The Supreme Court of Arkansas, by Judge Kirby, also observed in the *Crow Case, supra,* that:

> "It soon became apparent that the cause of education flourished and better schools were established and maintained in the single school districts where the directors were given more power in the control and management of the schools, and where they had more means for their maintenance, because of the wealth of the territory, and different communities and localities, desiring to improve their school facilities, sought relief of the legislature in the enactment of divers special acts, creating single or special school districts out of territory that could not be included within such districts under the general law, and giving the directors thereof increased powers. To meet this insisted demand and avoid so much troublesome special legislation, the general law was made, authorizing the organization and establishment of rural special school districts."

The general law to which reference was there made was Act 321, Acts of 1909, page 947, as amended by Act 169, Acts, 1911, page 141. Act 321, Acts of 1909, consists of only four short sections. Section 2 authorizes the county judge to call the election for determination whether any given territory other than incorporated cities and towns shall be organized as a "single" school district. Section 4 is a repealing clause. Sections 1 and 3 are here set out in full.

> "Section 1. That when the people of any given territory in any county in this state, other than incorporated cities and towns, desire to avail themselves of the benefits of all laws of this state, for the regulation of public schools in incorporated cities and towns, they may be organized into and established as a single school district in the manner and with powers therein provided, with such modifications of said laws as are herein provided."
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> * * * * * * *
>
> "Section 3. That all school districts created under this act shall have power to borrow money as any other special or single school district in cities or incorporated towns, when a majority of the legal electors vote for the same, at any annual school meeting."

The only "modifications of said laws" made by Act 321 were (1) the provisions whereby the county judge could call the necessary election for organization and (2) the last clause of Section 3, which restricted the power to borrow money, as an urban district could, to cases "where a majority of the legal electors vote for the same, at any annual school meeting."

Act 169, Acts of 1911, page 141, which amended and enlarged Act 321, Acts of 1909, consists of nine sections. The first six sections deal with the election of directors and the annual election. Section 7 specifically provides that "Rural special school districts

shall have the power to borrow money for the purposes and in the manner provided in Sections 7696, 7697 and 7698, of Kirby's Digest." The sections mentioned are the effective sections of Act 85, Acts, 1903, as re-enacted by Act 248, Acts, 1905. Section 7 of Act 169, Acts of 1911, then goes on to provide that:

> "In addition to such power, the board of directors shall have the power to borrow money for building purposes if authorized by a vote of a majority of the electors of the district at any annual election."

This Section 7 is lengthy, taking up almost three pages, and it is at once apparent that the first two sentences, above quoted, were not intended to be a construction by the legislature to the effect that urban special school districts under Act 248, Acts of 1905, had no power to borrow money except upon a vote of the electors. In any event, the contrary was specifically held by the Supreme Court of Arkansas, some eighteen months after the passage of Act 169, Acts of 1911, in the case of *Milwee* v. *Board of Directors of Horatio Special School District*, 105 Ark. 77, 150 S. W. 391, to which reference has already been made.[7]

It is apparent, upon a reading of Section 7, Act 169, Acts of 1911, that its purpose was to make definite and

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[7]The Supreme Court of Arkansas repeated that holding, in specific language, as late as 1926, saying, in the case of *Davis* v. *White*, 171 Ark. 385, 284 S. W. 764, that:

> "But Mammoth Spring Special School District No. 2 is not a rural special school district and did not derive its authority to issue bonds from Sec. 8837, C. & M. Digest. Sec. 8984, C. & M. Digest, is the section of the statute under which appellee school district proceeded, and this section does not require, as a condition precedent to the issuance of bonds, the consent of the electors (citing the *Milwee Case, supra*). In other words, the affirmative vote of the electors is not required to confer this authority on the urban special school districts of the state, which derive their authority to issue bonds under Sec. 8984, C. & M. Digest."

certain the meaning, purpose and function of a "building fund" in a rural special school district, maintained by a continuing levy, if authority for creation of such a fund was conferred by the electors in the first instance it may be thought that this is a legislative construction of Act 248, Acts of 1905, as not granting any power to the boards of directors of urban special school districts to create a "building fund." That may be so as to a building fund maintained by a continuing levy, but it does not follow that if no power existed under Act 248, Acts, 1905, to create a building fund maintained by a continuing levy, there was also no power thereunder to pledge the revenues of the district, as and when received, and to create a building fund out of such revenues.

In the case of *Crow* v. *Special School District No. 2*, 102 Ark. 401, 144 S. W. 226, the court, by Judge Kirby, discussed the provisions of Act 321, Acts of 1909, and Act 169, Acts of 1911, in some detail, and said:

> "The directors are given certain enlarged powers. They may borrow money as provided under the law for the government of single special school districts and may provide for a building fund, if authorized by the electors at the annual election * * *."

Section 7 itself contained the following proviso:

> "*Provided*, that, whether the vote be 'For Building Fund,' or 'Against Building Fund,' this shall not prevent the electors from voting for a building tax, as now provided by law."

We submit that the purpose and effect of the provisions of Section 7 of Act 169, Acts of 1911, was to provide a means by which a continuing levy could be voted by a rural special school district at the original election authorizing the borrowing of money, instead of leaving the obligations of the rural special school districts subject to the necessity of an affirmative vote at each an-

nual election, for the reason that the credit of the rural districts was not as good as that of the urban districts, where, as to the latter, the pledge of the revenue, as and when voted, levied and collected in each year was sufficient to enable them to borrow money on favorable terms, even without provision for a continuing levy.

In the opinion in the *Crow Case, supra*, after setting out in detail the provisions of Section 7 of Act 169, Acts of 1911, the court went on to say:

> "It is true this method of borrowing is not exclusive but it indicates the legislative intent. The necessity existed for the borrowing of money by the school districts of the state for the improvement and maintenance of its schools, and the legislature recognized it, and gave the authority to mortgage property of the district, and in effect pledge certain revenues thereof for the payment of the loan."

The gist of the decision of the circuit court of appeals, in this case, is found in the two following sentences (121 F. 2d 423, at p. 425):

> "We have held above that under the law of Arkansas, the bondholders never had a lien on the general tax revenues of the district, and so they could not have compelled the board of directors to make application of any part of such revenues to the payment of their bonds, as a matter of contract obligation. That which was not an enforceable contract right was not an obligation which could be impaired, within the meaning of the constitutional prohibition."

Earlier in that opinion the court had referred to its decision in the case of *Women's Catholic Order of Foresters* v. *Special School District of North Little Rock*, 105 F. 2d 716 (hereinafter referred to as the "Foresters case"), saying that it had there held that:

> "* * * the authority of the board of directors of an urban special school district, under the statutes

involved, to issue bonds on behalf of the district without a vote of its electors, did not include the power to pledge the general tax revenues of the district, and that an attempt by the board to create a lien upon any part of such revenues was void."

In the *Foresters Case, supra*, the same court had said, after discussing certain statutes and the *Horne* and *Pledger* cases:[8]

> "It is noticeable that by none of these acts, constitutional or statutory, was any power conferred to pledge revenues. It is also observed that the constitutional provision is that the tax shall be voted in each year. So far as the law in force when these bonds were issued is concerned, it seems extremely doubtful whether the school district could do more than make an annual appropriation for building purposes through action of its electors."

We refer below to, and quote from, a considerable number of statutes which did specifically and in terms authorize the directors of urban special school districts to pledge the revenues of such districts. Likewise, we have presented in this brief a number of decisions of the Supreme Court of Arkansas, which we consider to be directly and indirectly in point upon the power of the directors of such districts to pledge the revenues, to which, both statutes and decisions, no reference appears in the opinion in the Foresters case, nor in the opinion of the circuit court of appeals in this case, nor in the briefs of the parties to this case, now before this Court. We respectfully submit that the Circuit Court of Appeals for the Eighth Circuit has given too much weight to the equivocal language of the *Horne* and *Pledger* opinions, without having before it the full facts and circum-

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[8]*Horne* v. *Paragould Special School District*, (Feb. 20, 1933) 186 Ark. 1000, 57 S. W. 2d 568.

Pledger v. *Cutrell*, (Oct. 15, 1934) 189 Ark. 562, 74 S. W. 2d 646, and 75 S. W. 2d 76.

stances upon which a decision on this fundamental and all important question should be reached, and that perhaps, and we say it with all respect, the decisions of the Supreme Court of Arkansas, in those two cases, might have resulted from a similar lack of historical and judicial background.[9]

We think it apparent that when the Supreme Court of Arkansas, on February 19, 1912, in that part of the opinion in the case of *Crow* v. *Special School District No. 2*, 102 Ark. 401, 144 S. W. 226, last above quoted, said that the continuing levy provided for by Section 7 of Act 169, Acts of 1911, was not exclusive, and that:

> "The necessity existed for the borrowing of money by the school districts of the state for the improvement and maintenance of its schools, and the legislature recognized it, and gave the authority to mortgage property of the district, and in effect pledge certain revenues thereof for payment of the loan."

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[9]We say this with all respect, and desire to point out that the Supreme Court of Arkansas has itself been entirely frank in such a situation. In the case of *Dickinson* v. *Housley*, 130 Ark. 259, 197 S. W. 25, it reversed, without mention, its decision upon a point of law made in the earlier case of *Brunson* v. *Board of Directors of Crawford County Levee District*, 107 Ark. 24, 153 S. W. 828, and, in the still later case of *Chicago, R. I. & Pac. Ry. Co.* v. *Brazil*, 166 Ark. 246, 266 S. W. 66, it frankly said:

> "Our attention is called to the case of *Dickinson* v. *Housley*, 130 Ark. 259, where, under very similar facts, we permitted the receiver of the appellant railroad company to recover taxes illegally levied. An examination of that case and of the briefs filed by counsel shows, however, that the question of duress was not there raised, and our decision and opinion covered only the points raised by counsel. Had this point been raised, or had it suggested itself to us in our consideration of the case, we would necessarily have held, upon the authority of *Brunson* v. *Board of Directors, supra*, that the payment was a voluntary one, and that the taxes paid could not be recovered on that account."

it had reference to the urban special school districts and the power they possessed under Act 248, Acts of 1905, to execute mortgages on their property "and in effect pledge certain revenues thereof for payment of the loan."

We submit there can be no other reasonable reference for this language. The court could scarcely have been talking about Section 7 of Act 169, Acts of 1911, which it had just mentioned in considerable detail, as that section provided for a continuing levy and specifically, not merely "in effect" pledged the revenues of the district, and, furthermore, the court was not at that point referring to the powers of the rural special school districts, authorized by Act 321, Acts of 1909, as amended by Act 169, Acts of 1911, but was referring to "the school districts of the state."

It is a matter of regret, of course, that no more specific pronouncement by the Supreme Court of Arkansas can be found. We think the reason the court in the *Crow Case, supra*, qualified its statement of the existence of the power to pledge the revenues by the words, "in effect," was because it was well understood on all sides that the board of directors of an urban special school district could not create a continuing levy, absent the prior authority of an election, and that the pledge was only and solely of the revenues as and when voted, levied and collected. We also think the reason no more specific holding to that effect can be found is because the existence of that limited power was so well understood in Arkansas, over such a long period of time, that it was never questioned until the decisions in the *Horne* and *Pledger* cases,[10] out of which the present state of this

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[10]*Horne* v. *Paragould Special School District*, 186 Ark. 1000, 57 S. W. 2d 568.

Pledger v. *Cutrell*, 189 Ark. 562, 74 S. W. 2d 646, and 75 S. W. 2d 76.

litigation resulted, by a more or less inevitable and unfortunate evolution. We also think, however, that an examination of the more or less contemporaneous acts of the Arkansas legislature, in 1905 and 1907, and of the earlier decisions of the Supreme Court of Arkansas, over and above the *Schmutz* case, will demonstrate that our opinion is not surmise or inference but is based upon matter having direct probative force.

We have pointed out above that the 1903 legislature, in addition to passing the general act of that year (Act. 85, Acts of 1903), also passed eleven special acts authorizing school districts to borrow money. These acts are tabulated in Footnote 4. No one of these acts specifically mentioned the pledge of the revenues, tax or otherwise. An examination of the acts adopted at the 1905 and 1907 sessions of the legislature, however, discloses a very different situation.

First to be mentioned was the adoption of Act 248, Acts of 1905, with a broader title, re-enacting Act 85, Acts of 1903, and omitting Section 4 of that act. This in itself is important and significant. Next we have the special acts passed at both the 1905 and 1907 sessions of the legislature.

The total legislative output of the 1905 legislature was 350 acts. Thirty-nine of those acts, in addition to Act 248, or over 10% of the entire legislative product of that session related to school districts, and we have here listed, for the convenience of the court, the entire 39 of such acts, to-wit:

#	Act 22, p. 74	* Corning Special School District
	Act 32, p. 107	Salem School District
	Act 39, p. 119	Mount Olive School District
	Act 40, p. 122	* Special School District No. 9, of Wynne, Cross County, Arkansas
	Act 46, p. 134	Special School District of Booneville, Arkansas

	Act 55, p. 154	*	Little Rock Special School District
	Act 64, p. 166		School District No. 43, Craighead County
	Act 67, p. 169	*	McCrory Special School District
	Act 68, p. 171	*	Piggott Special School District
	Act 70, p. 173	*	Craighead County, School District No. 21
#	Act 94, p. 220	*	Marianna Special School District
	Act 127, p. 323		Glendale School District
#	Act 135, p. 340	*	England Special School District
	Act 139, p. 347		Damascus School District
	Act 140, p. 351	*	Manilla Special School District
	Act 141, p. 353		Searcy School District
	Act 155, p. 396	*	Pine Bluff Special School District
	Act 167, p. 415		Boughton School District
#	Act 176, p. 462	*	DeQueen Special School District
	Act 182, p. 470		Mount Olive Special School District
	Act 186, p. 475		Kensett Special School District
	Act 190, p. 486	*	Lakeside School District
	Act 195, p. 503		Irons Point Special School District
#	Act 197, p. 507	*	Fordyce Special School District
	Act 205, p. 531	*	St. Joe Special School District
	Act 208, p. 535	*	Malvern Special School District
	Act 211, p. 539		Fulbax Special School District
	Act 223, p. 564		Star City Special School District
	Act 226, p. 574	*	Stuttgart Special School District No. 22
#	Act 230, p. 580	*	Harrisburg School District
	Act 258, p. 671	*	Hope Special School District
#	Act 267, p. 684	*	Mineral Springs Special School District
	Act 293, p. 721	*	Blytheville Special School District
	Act 297, p. 725	*	Biggers Special School District
	Act 301, p. 729	*	North Yellville Special School District
#	Act 314, p. 755	*	Success Special School District
#	Act 318, p. 760	*	Tuckerman Special School District
	Act 342, p. 801		Bodcaw School District
	Act 349, p. 810		Ledwidge Special School District

There were twenty-four of those acts which authorized the special school districts named to borrow money. Such acts are marked thus (*). There were nine of such acts which specifically authorized the pledge of all or

part of the revenues of the district to secure the repayment of the money borrowed. Those acts are marked thus (#).

The first of these special acts enacted at the 1905 session of the legislature was Act 22. The full title of this act is as follows:

> "AN ACT to organize the Corning Special School District in Clay County, Arkansas, and to authorize said district to borrow money and to mortgage its property."

The title of the act contained no mention of any authority to pledge the revenue of the district, or any part of it. The first section of Act 22 creates the district, the second section authorizes it to borrow money not to exceed $5,000, and to execute a mortgage on its real property, the third section specifies how the note or notes and mortgage shall be signed, and that they shall be in the usual form, and the fourth section reads as follows:

> "Section 4. From the revenue received by said district, the directors shall pay, first the interest on any loan, or loans, negotiated under the authority of this Act, and shall create and provide from the revenue for a sufficient sinking fund for the purpose of paying the indebtedness created under the authority of this Act, as the same shall become due and payable."

Act 94, Acts of 1905, page 220, authorized the board of directors of Marianna Special School District to borrow not to exceed $25,000, and to mortgage the property of the district. The last sentence of Section 1 of this act read as follows:

> "And said directors are further empowered to pledge or use one mill of the authorized levy of taxes annually of said district, for the purpose of paying or of creating a sinking fund for the payment of money borrowed, with interest, for building purposes."

Act 135, Acts of 1905, page 340, authorized the board of directors of England Special School District to borrow not to exceed $10,000 to mortgage the property of the district, and Section 1 thereof contained the following clause:

> "* * * and said directors are further empowered to pledge or use one mill or more of the authorized levy of taxes annually of said district for the purpose of paying off or creating a sinking fund for the payment of the money borrowed with interest, for building purposes herein provided."

It will be noted that this clause mentions one mill, but that the authority of the directors is specifically not limited to the pledge of one mill.

Act 176, Acts of 1905, page 462, authorized the board of directors of DeQueen Special School District to borrow money to build and equip a high school, in an amount not to exceed $15,000, to mortgage its real estate, and Section 1 of the act contained the following as the last sentence thereof:

> "And said board of directors is further empowered to pledge or use two mills of the levy of taxes annually of said district, for the purpose of paying or creating a sinking fund for the payment of the money borrowed, with interest, for the building and equipping the school building provided for."

The four acts above quoted from each provided that the mortgage should be "in form in all respects as are other instruments of like kind." It would seem that it was the common practice, at that time, to include in such mortgages a pledge of the revenues of the district. Act 22 contained no limitation upon that pledge. Acts 94, 135 and 176, instead of constituting some special authority, were, in fact, a limitation. The maximum rate, in 1905, was 5 mills, and one mill and two mills constituted respectively, 20% and 40% of the maximum levy.

Act 197, Acts of 1905, page 507, is of particular importance, as it was the act before the Arkansas Supreme Court in the case of *Hampton* v. *Hickey,* (Dec. 7, 1908) 88 Ark. 324, 114 S. W. 707. That case and Act 197 are discussed below, at the conclusion of the presentation of the relevant matter found in the various acts passed at the 1905 and 1907 sessions of the legislature, the latter session having been concluded prior to the decision in *Hampton* v. *Hickey, supra.*

Act 197, Acts of 1905, page 508, authorized the board of directors of the Fordyce Special School District to borrow not to exceed $15,000, to mortgage the property of the district, and the last sentence of Section 1 read as follows:

> "And said directors are further empowered to pledge or use one mill of the authorized levy of taxes annually of said district for the purpose of paying off or creating a sinking fund for the payment of the money borrowed, with interest, for building purposes herein provided."

Act 230, Acts of 1905, page 580, is a most detailed enactment. It creates a special school district, known as Harrisburg School District, and authorizes it to borrow money, not to exceed $15,000, provides for the registration of the bonds, for their callability after 20 years if a sinking fund therefor shall be created, directs how they shall be executed and delivered, for the keeping of a registry, and numerous other matters, including some that were probably beyond the power of the legislature. Strangely, this special act is silent on the matter of executing a mortgage, but its Section 13 reads as follows:

> "Section 13. That to the payment of both principal and interest of the bonds to be issued under the provisions of this act, the entire revenue of the district arising from the provision herein is by this act pledged, and the board of directors are hereby required to set apart annually a sufficient amount thereof to secure and pay the interest on said bonds."

Act 230 takes up almost eight printed pages and it may not be unreasonable to suppose that its length, as well as the large number of such special acts introduced and passed at that session of the legislature, influenced the passage of Act 248, Acts of 1905. In any event, the next act following Act 230, and appertaining to special school districts, is Act No. 248.

Act 267, Acts of 1905, page 684, authorized the board of directors of Mineral Springs Special School District to borrow money, limited to $10,000, the execution of a mortgage, and contained the following as the last sentence of Section 1:

> "And said board of directors is further empowered to pledge or use one mill of the levy of taxes annually of said district for the purpose of paying or of creating a sinking fund for the payment of the money borrowed, with interest, for building or equipment purposes, as herein provided."

Act 314, Acts of 1905, page 755, contains the same unlimited authority as was found in Act 22. Act 314 creates the Success Special School District, authorizes it to borrow money and mortgage its property, and provides in its Section 4 as follows:

> "Section 4. From the revenue received by said district, the directors shall pay, first the interest on any loan or loans negotiated under the authority of this act, and shall create and provide from the revenue for a sufficient sinking fund for the purpose of paying the indebtedness created under the authority of this act, as the same shall become due and payable."

Act 318, Acts of 1905, page 760, is equally significant. Section 1 creates the Tuckerman Special School District. Section 2 authorizes it to borrow money, not to exceed $5,000. Section 3 authorizes it to execute a promissory note therefor. Section 4 authorizes it to execute a mortgage upon the real property of the district to secure the note, and Section 5 reads as follows:

"Section 5. Said board of directors is further empowered and authorized to pledge or use such part of the levy of taxes annually of said district for the purpose of paying off said note or notes and the interest thereon, or for creating a sinking fund for such payment as may be necessary."

The decision in the case of *Schmutz* v. *Special School District of Little Rock*, 78 Ark. 118, 95 S. W. 438, came down on March 3, 1906, between the 1905 and 1907 sessions of the legislature, but it is apparent from an examination of the 1907 acts that that decision created no doubt in the legislative mind as to its power to authorize the boards of directors of special school districts to borrow money, and, in addition to mortgaging the real property, to pledge the revenues of the district for the repayment thereof.

The Legislature of 1907 devoted no small part of its work to special school districts. A total of sixty-nine special acts either creating special school districts or authorizing them to borrow money, or both, were adopted at that session. Forty-five of these special acts authorized the borrowing of money and eighteen of them contained specific authority for the pledge of all or part of the revenues of the district. In passing, it should be noted that a total of 460 acts were adopted at the 1907 session of the legislature and that the sixty-nine acts affecting special school districts represent approximately 15% of the work of that session. A tabulation of these sixty-nine acts affecting special school districts is here set out as follows:

	Act 2, p. 3	Humphrey Special School District
	Act 9, p. 11	Siloam Springs, School District of
	Act 14, p. 17	* Lakeside School District of Chicot County.
#	Act 20, p. 24	* Jonesboro Special School District
	Act 27, p. 35	* Charleston Special School District

	Act 35, p. 80	*	Rector, Special School District No. 46 of
#	Act 49, p. 120	*	Kibler Special School District
#	Act 50, p. 122	*	Datto Special School District No. 71
	Act 57, p. 136	*	Prairie Grove, Special School District of
	Act 60, p. 141	*	Dermott School District
	Act 67, p. 156	*	Rogers, Special School District of
	Act 75, p. 169	*	Altus, Special School District No. 31 of
#	Act 86, p. 189	*	Monticello School District
	Act 88, p. 193		Higginson Special School District
	Act 93, p. 212	*	Cotter Special School District No. 60
#	Act 97, p. 218	*	Arkadelphia Special School District No. 1
	Act 98, p. 222		Columbus, School District of
	Act 108, p. 272		Evening Shade School District
#	Act 114, p. 291	*	Ola Special School District
	Act 127, p. 318	*	Reyno Special School District
	Act 138, p. 330	*	Springdale Special School District
	Act 163, p. 396	*	Howell, School District No. 21 of
	Act 164, p. 397		Arnold School District
#	Act 173, p. 412	*	Washington Special School District
	Act 174, p. 418	*	Osceola, Special School District of
	Act 180, p. 425		Center Point Special School District
#	Act 187, p. 439	*	Bethseda School District
#	Act 188, p. 441	*	Jacksonville, Special School District of
#	Act 191, p. 448	*	Jasper Special School District
#	Act 192, p. 450	*	Paragould, Special School District of
	Act 211, p. 494		Faulkner School District
	Act 213, p. 497		West Hartford Special School District
	Act 215, p. 511	*	DeWitt Special School District
#	Act 216, p. 513	*	Wilmot Special School District
	Act 217, p. 515		Cato School District
	Act 227, p. 630		Humphrey, School District of
	Act 234, p. 548	*	Lewisville Special School District
	Act 242, p. 561	*	Wolcott Special School District
	Act 244, p. 564	*	Thornton Special School District
	Act 248, p. 586		Ouachita County, Special School District in

	Act 249, p. 587		Columbus, School District of
#	Act 259, p. 603	*	Dover Special School District
	Act 262, p. 609		Izard-Sharp School District
	Act 265, p. 613		Knoxville Special School District
	Act 279, p. 650	*	Plain View Special School District
	Act 285, p. 677	*	Carthage, Special School District of
#	Act 289, p. 684	*	Brown Springs Special School District
	Act 299, p. 723	*	El Dorado, Special School District of
#	Act 318, p. 769	*	Portland, Special School District of
	Act 326, p. 799		McGehee School District, The
	Act 327, p. 801		Springdale, School District of
	Act 335, p. 816	*	Columbus, School District of
	Act 339, p. 823		Dierks Special School District
	Act 349, p. 837	*	Humphrey Special School District
	Act 361, p. 858		Tinsman Special School District
	Act 364, p. 862	*	Leslie Special School District
	Act 366, p. 886		Mt. Ida School District
#	Act 371, p. 932	*	Leola Special School District
#	Act 376, p. 949	*	Success Special School District
	Act 380, p. 960	*	Warren, School District of
	Act 381, p. 961		Choctaw School District
	Act 382, p. 962	*	Hermitage Special School District
#	Act 392, p. 981	*	Piggott Special School District
	Act 435, p. 1165		Owen Township School District
	Act 437, p. 1168		Greene County, Special School District of
	Act 449, p. 1223	*	Hoxie School District
	Act 450, p. 1224		Huntsville Special School District
	Act 457, p. 1233	*	Baxter County, School District No. 61 of
	Act 458, p. 1235	*	Jackman Special School District

The forty-five of those acts which authorized the named school districts to borrow money are marked thus (*). The eighteen of those acts which specifically authorized the pledge of all or part of the revenues of the district to secure the repayment of the money borrowed are marked thus (#). We consider it would unduly extend this brief and serve no useful purpose to set out

here, as was done with the similar acts of 1905, the exact language of the eighteen acts which specifically authorized the pledging of all or part of the revenues of the named districts. The language of the 1907 acts is much the same, with incidental variations, as the language used in the 1905 acts, and we respectfully refer the court to the eighteen acts of the 1907 legislature which are thus (#) marked. Suffice it to point out that while the 1905 legislature had adopted nine of such acts the 1907 legislature, in the face of the decision in the *Schmutz Case*, *supra*, doubled that number and adopted eighteen of such acts.

In the case of *Hampton* v. *Hickey*, 88 Ark. 324, 114 S. W. 707, decided by the Supreme Court of Arkansas on December 7, 1908, with the legislative product of both the 1905 and 1907 legislatures before it, a taxpayer sought to enjoin the Fordyce special school district from issuing bonds to the amount of $25,000 to secure funds to build two school houses. The gravamen of the action was that the district was limited to an indebtedness of $15,000 for that purpose by virtue of the provisions of a special act approved April 26, 1905 (Act 197, p. 507). The court held that the general act of May 6, 1905 (Act 248 of 1905), repealed the former act of April 26, 1905, and upheld the issuance of the $25,000 of bonds. The statement of facts, and the opinion, are, however, highly significant.

In the statement of facts the court summarizes part of the answer of the defendant district as follows:

> "They (the directors of the district) deny that the school district is authorized to borrow only $15,000, but say that at the time the special act described in the complaint was passed the school board could borrow money and mortgage the property of the district only after the submission of the question to the electors of the district at an annual school election, and that the object of the special act was to

enable the school directors of this district to issue bonds and execute a mortgage without such election; but, after said special act was passed, the legislature passed an act applicable to all special school districts, authorizing the board of directors of such special school districts to borrow money and mortgage the real property of the district without submitting the question to the electors and leaving the amount to be borrowed to the discretion of the board."

With respect to Act 248, Acts of 1905, the court said:

"The general statute by its title is 'an act to permit any special school district in the State of Arkansas to borrow money for building purposes,' etc. Section 1 provides 'that all special school districts are hereby authorized and empowered,' etc. The words used 'any and all,' evidence the intention of the legislature to create a uniform system to operate on all special school districts alike. At former sessions of the legislature, special acts had been passed enabling the special school districts named in the act to borrow money to build a schoolhouse. A great number of these special acts were introduced, and some passed at the 1905 session. Then the general act was passed. It is broader in its scope than any of the special acts. It covers the whole subject matter embraced by them, and the objects designed to be effected are the same."

One of the principal "objects designed to be effected" by these special acts was the borrowing of money by these urban special school districts without the authority of an election. Subsequently, in the case of *Milwee* v. *Board of Directors of Horatio Special School District*, (Oct. 7, 1912) 105 Ark. 77, 150 S. W. 391, the Arkansas Supreme Court held, in terms, that the general act of 1905 had accomplished that object.

One of the "objects designed to be effected' by Act 197, Acts of 1905, authorizing Fordyce special school district to borrow money, was to give it the power to pledge one mill of its annual tax revenue (Section 1, Act 197).

In the case of the Fordyce special school district, we submit that it is not reasonable to suppose that the Supreme Court of Arkansas, in holding that the district was not limited to $15,000 in bonds, nevertheless, was holding at one and the same time that the Fordyce Special School District was without authority to pledge even one mill of its revenues. Other of the 1905 acts contained no such limitation, either in mills or percentages. The general act (Act. 248, Acts, 1905) was held to be "broader in its scope than any of the special acts," and we respectfully submit that the court must have held that the general act not only removed the limitation to the one mill contained in the Fordyce act, but that the general act included and carried with it the power to pledge the revenues, without limit.

The legislature met again the following year, in 1909, and adopted Act 321, Acts of 1909, which is discussed in the earlier part of this brief at some length. The decision in the case of *Hampton* v. *Hickey*, *supra*, was before the legislature at the 1909 session. If the meaning and effect of the decision in that case had not been in accord with the intention of the legislature and with the desired scope and effect of Act 248, Acts of 1905, there was no more appropriate time for the legislature to have remedied the situation. It did not do so. On the contrary it passed an act authorizing the creation of rural special school districts and extending to such districts all of the benefits of the urban special school districts, except that the latter were required to have the prior authority of an election in order to borrow money.

We are now brought to the case of *Schmutz* v. *Special School District of Little Rock*, 78 Ark. 118, 95 S. W. 438, which was decided on March 3, 1906, and to the equivocal language of that opinion upon which the respondents rely. That case involved Act 55, Acts of 1905, which contains a Section 2 that may appear to be identical with Section

2 of Act 248, Acts of 1905, but, in fact, is not identical therewith. Section 2 of Act 248, fairly read, only required that the evidences of indebtedness should be drawn upon the "building fund" when warrants were issued, and did not require that notes (*i. e.*, bonds) when issued to evidence the indebtedness should be drawn upon the building fund.

The corresponding provisions of Section 2 of Acts 55 and 248, showing this difference, are set out below in parallel columns:

Act 55.	Act 248.
"Sec. 2. Said evidences of indebtedness, whether warrants or promissory notes, * * * shall be drawn upon the building fund * * *."	"Sec. 2. The said evidences of indebtedness, whether warrants or promissory notes, or both, and mortgages, shall be in form in all respects as other instruments of like kind are required by law to be, * * * and the warrants * * * shall be drawn upon the building fund * * *."

Reference to Act 185, Acts of 1903, for example, will show that this distinction was understood at that time by the legislature, and in Act 86, Acts of 1907, the equivalent of Section 2 of Act 248, Acts of 1905, was divided into three separate sections. In addition, we wish to call attention to the fact that Act 155, Acts of 1905, had a Section 2 which was, in fact, identical with Section 2 of Act 55, and not identical with Section 2 of Act 248, and that no other of the special acts passed at the 1905 session had a similar section. The significance of this is that Act 55 was the act authorizing the Special School District of Little Rock to borrow money and Act 155 was the act au-

thorizing the Special School District of Pine Bluff to borrow money. There was the further fact that Act 248, Acts of 1905, specifically excluded Jefferson County from its operation, and Jefferson County was the county of which Pine Bluff was the county seat. Little Rock and Pine Bluff were two of the largest cities in the state, and the court may well have considered that the difference in language between these acts was not a *lapsus linguae* on the part of the legislature, but was intended, in some way, to restrict the directors of such districts in the security which they might offer, by requiring that their obligations should be drawn upon the building fund. The decision in *Hampton* v. *Hickey*, *supra*, was still more than a year away, and there was yet no decision that Act 248, Acts of 1905, was broader than any of the special acts. It is a reasonable assumption that if the order of decision of the cases of *Hampton* v. *Hickey* and the *Schmutz* case had been reversed, the opinion in the *Schmutz* case would have contained no such equivocal language.

That which was troubling the court in the *Schmutz Case, supra,* was the question whether the peculiar wording of Section 2 of Act 55 (Little Rock), found only in one other of these numerous special acts of the 1905 legislature (Act 155), requiring that notes, as well as warrants, be drawn upon the building fund, was intended to be a restriction upon the general power to pledge the revenues. When the Arkansas court said that "this in effect pledges the building fund of the district whatever that may be" it was not expressing any doubt or uncertainty as to what the building fund was. Its doubt was whether the building fund could be construed to be made up of the entire revenues, in view of the restricted language of Section 2 of Act 55. This would seem to be clear because of the use of the words, "in that way," appearing in the second sentence follow-

ing. The court said, "But if we concede that the directors had no authority to pledge the revenues of the district in that way." What did it mean by "in that way?" Under the other acts (including Act 248 if notes (and not warrants) were issued), the court had no doubt that the directors could pledge all of the revenues, as and when received. The problem the court was facing was the question whether the directors could pledge all the revenues when they were limited, by the peculiar language of Act 55 to making even notes payable out of the building fund.

We have examined the record in the instant case, and find that the deed of trust for the 1926 bonds contains a covenant or representation that the district has created a "building fund" (R. 17). The deed of trust for the 1931 bonds contains a similar covenant or representation (R. 43). Section 2 of Act 248, however, did not require that these bonds be "drawn upon the building fund," as these bonds are not "warrants," and there is nothing in either deed of trust, or in the bonds of either issue, that limits their payment to the "building fund." On the contrary, there are specific pledges of all of the revenue of the district, both in the bonds (R. 11, 38) and in the deeds of trust (R. 7-8, 18 and R. 34, 44). This would appear to be entirely in accord with the law of the state, as expressed by the Supreme Court of Arkansas as recently as 1931, where in the case of *American Exchange Trust Company* v. *Truman Special School District*, 183 Ark. 1041, 40 S. W. 2d 770, where it said that there was no doubt but that the board of directors could provide a building fund (meaning, we think, out of the revenues as and when received, and not one maintained by a continuing levy), but that "the statute does not require that it shall be done, except when warrants payable in the future are issued as evidences of indebtedness for the money borrowed."

The district court so found in this case, in its decree of June 28, 1938, the pertinent language of its findings and conclusions of law being (R. 76-77):

> "* * * that it was contemplated and agreed that the bonded debt of the district should be paid out of its future tax revenues in the manner provided for in said respective deeds of trust and that said pledge of revenues to secure the payment of said bonds is a prior and superior lien to all other liens or debts of the district and all bonds of the district as to said revenues stand upon a parity, one with the other and should share in said revenues upon a pro rata basis.
>
> "Wherefore: 1. The court declares the law to be that it has jurisdiction of the parties and the subject matter of this suit; that the plaintiff and intervenors have a prior lien on the real estate described in the respective mortgages or deeds of trust and all revenues of the district from whatever sources derived.
>
> "2. That at the time of the execution of said respective deeds of trust and the issuance of said bonds the district was duly authorized and empowered to borrow money and mortgage the real property of the district and pledge its future revenues to secure the payment thereof."

Significantly, the above findings and conclusions of law were made subsequently to the decisions in the cases of *Horne* v. *Paragould Special School District*, (February 20, 1933) 186 Ark. 1000, 57 S. W. 2d 568, and *Pledger* v. *Cutrell*, (October 15, 1934) 189 Ark. 562, 75 S. W. 2d 76, so it would seem apparent that at the time of the decree of June 28, 1938, the district court did not consider that those cases were, or could be, controlling. The decree appealed from, of June 17, 1940, was made subsequently to the opinion of the Circuit Court of Appeals in the case of *Women's Catholic Order of Foresters* v. *Special School District of North Little Rock*, (July 27, 1939) 105 F. 2d 716, so that it seems to us that it is the federal courts, and not the state court, that must be

deemed to have failed to follow the established law of the state respecting the power of the boards of directors to pledge the revenues.

Point II. Amendment No. 11 Did Not Affect or Restrict the Existing Power under Act 248, Acts of 1905, to Pledge the Revenues of the District.

Section 3 of Article XIV of the Constitution, as in effect from 1874 to 1926, authorized the millage levy "for school purposes." Amendment No. 11, in addition to increasing the limit that could be levied, substituted for those words the words "for the maintenance of schools, the erection and equipment of school buildings and the retirement of existing indebtedness for buildings." This change might be thought to have been designed to come within the language of the Supreme Court of Arkansas in the case of *School District of Hartford* v. *West Hartford Special School District*, 102 Ark. 261, 143 S. W. 895, where the court said:

> "Evidently, then, the section of the constitution in question did not intend to place any restriction on the use of school funds, other than that they should be used for school purposes. If it had appropriate language to effectuate that intent would have been used. If the framers of the constitution did not divide the school fund into separate classes, but, on the contrary, did provide a maximum rate which might be levied for all school purposes, how can it be said that such fund is appropriated to another purpose when it is designated and intended to be used for any of the purposes for which it might be levied?"

In other words, it might be argued that this change, within the language of the opinion in the *School District of Hartford Case, supra*, "means that a tax voted for

building purposes shall not be appropriated for any other purpose than that for erecting a schoolhouse," and that, as a result of Amendment No. 11, a tax voted for any one of the three enumerated purposes could not be used for either of the other two named purposes. As a matter of fact, it would appear that that is what the Arkansas Supreme Court actually held in the cases of *Horne* v. *Paragould Special School District No. 1*, 168 Ark. 1000, 57 S. W. 2d 568, and *Pledger* v. *Cutrell*, 189 Ark. 562, 75 S. W. 2d 76.

Amendment No. 11, on its face, however, did not accomplish such a result as the court found in the *Horne* and *Pledger* cases. In the *School District of Hartford Case*, *supra*, the Arkansas court said:

> "The section of the constitution in question provides that the general assembly may by general laws authorize school districts to levy by a vote of the qualified electors of such district a tax not to exceed a certain rate. This is for all school purposes and the particular rate which can be levied or used for the purpose of constructing schoolhouses in the several districts is not designated."

The change in language (as well as rate) made by Amendment No. 11 did not designate the particular rate which could be levied for any one or more of the enumerated purposes. In the absence of such a designation it would seem that Amendment No. 11, on its face, did not serve to diminish or lessen the powers of the special school districts existing prior to 1926, and thereafter until 1931, to pledge the tax revenues of the districts. Consequently, we respectfully submit that prior to the decisions in the *Horne* and *Pledger* cases it was well understood that Amendment No. 11 did not serve to put it in the hands of the electors to defeat the pledge of the tax revenues, for

the payment of interest as well as principal, if any tax was to be voted, by voting a tax for one or two of the specified purposes, and failing or refusing to vote a tax for "the retirement of existing indebtedness on buildings." Payment of interest is not retirement of indebtedness.

This seemingly clear construction of Amendment No. 11 appears necessarily to be confirmed by the enabling act passed at the 1927 session of the legislature (Act 63). Act 63, Acts, 1907, p. 177, is as brief as possible, consisting of two sections, Section 2 being a repealing clause, and, after reciting the amendment, Section 1, in full, reads as follows:

> "Section 1. That the qualified electors of the school districts at an annual school election may, in accordance with election procedure provided for by law, levy any rate of school tax they may desire. Provided that no rate voted shall exceed eighteen mills on the dollar."

It is likewise confirmed by the opinion of the Arkansas Supreme Court on May 4, 1931, in the case of *American Exchange Trust Co.* v. *Truman Special School District*, 183 Ark. 1041, 40 S. W. 2d 770. At that time, five years after the adoption of Amendment No. 11, the Arkansas court referred to the *Schmutz* case by name, and repeated the finding of the opinion in the *Schmutz* case that "it was evidently the intention of the legislature (in enacting Act 248 of 1905) that they (bonds issued under the authority of Act 248 of 1905) should be paid out of the revenues of the district 'and are therefore a charge against such revenues.' "

CONCLUSION.

We think the apparent legislative confusion in 1905 and 1907 over the necessity of an election and the power to pledge the tax revenues, as and when received, was clearly resolved by the decisions of the Supreme Court of Arkansas between 1905 and 1912, being, in particular, the cases of *Schmutz* v. *Special School District of Little Rock*, (March 3, 1906) 78 Ark. 118, 95 S. W. 438; *Hampton* v. *Hickey*, (Dec. 7, 1908) 88 Ark. 324, 114 S. W. 707; *Crow* v. *Special School District No. 2*, (Feb. 19, 1912) 102 Ark. 401, 144 S. W. 226, and *Milwee* v. *Board of Directors of Horatio Special School District*, (Oct. 7, 1912) 105 Ark. 77, 150 S. W. 391; that the apparent hesitancy of the *Schmutz* case is not real; that the existence of the questioned power was clearly confirmed by the legislative enactments in 1913 and thereafter, and by the decisions of the Arkansas Supreme Court rendered thereafter and up to and including the year 1931.

We respectfully submit that there has been an impairment of a valid and subsisting contractual obligation, carried by the bonds involved in this case and that the petition for certiorari herein should be granted, and that the judgment and decree appealed from should be reversed.

Respectfully submitted,

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